Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OKSANA OLESZKO,
Petitioner,

vs.

STATE COMPENSATION INSURANCE FUND, DAVID HOWARD, and DORA COOKE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In this employment discrimination action, the employer obtained summary judgment because petitioner failed to establish essential elements of her federal civil rights claims. She also sought discovery of other employees' records from the employer's Employee Assistance Program ("EAP"), to see if there were a pattern and practice of discrimination. Petitioner failed to establish her civil rights claims because of facts specific to her workplace situation, an outcome that could not be changed by discovery of other employees' communications to the EAP. The lower courts denied the discovery request, holding the records privileged under the psychotherapist-patient privilege established in *Jaffee v. Redmond*, 518 U.S. 1 (1996). The question presented is:

Should the psychotherapist-patient privilege recognized in *Jaffee v. Redmond* be extended to an EAP which provides confidential assessment of employee problems, makes referrals which may include licensed psychiatrists, psychologists and clinical social workers, communicates directly with the psychotherapist and pays for the treatment in some instances, and follows up with the employee to offer support and make certain the referral and psychotherapy are effective?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Respondent State Compensation Insurance Fund is an agency of the State of California. As such, it has no parent company, and no subsidiary companies.

Respondents David Howard and Dora Cooke are natural persons.

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STATEMENT OF THE CASE

A. Introduction

The Petition for Writ of Certiorari focuses on a unique discovery dispute involving communications to one employer's Employee Assistance Program ("EAP"). This discovery dispute does not, in any way, affect the ultimate disposition of the underlying federal civil rights claims. As shown below, the District Court and the United States Court of Appeals for the Ninth Circuit both correctly held, in unpublished opinions, that petitioner Oksana Oleszko could not establish essential elements of her *own* civil rights claims, holdings that would not be changed even if the requested discovery of other employees' communications to the EAP were allowed. Respondent State Compensation Insurance Fund ("SCIF"), therefore, was and is entitled to summary judgment regardless of the outcome of the discovery dispute.

Consequently, the present case is a particularly inappropriate vehicle for review by this Court of the Court of Appeals' published opinion that employee communications to SCIF's EAP should be treated as privileged under Rule 501 of the Federal Rules of Evidence and *Jaffee v. Redmond*, 518 U.S. 1 (1996). Further, the published opinion is a straightforward and correct application of Rule 501 and *Jaffee*; there is no conflict among the Circuits and, indeed, there is scant litigation in this area; and the recent decision in *Jaffee* does not require revisiting.

B. Facts

1. Oleszko's Civil Rights Claims

Since 1989, Oleszko has worked for SCIF, a state agency, at its San Francisco Home Office. Oleszko began employment at SCIF as a computer programmer.

With assistance from SCIF managers David Howard and Dora Cooke, Oleszko successfully completed her probationary period as a programmer in one year, and thus became a career civil servant in 1990. SCIF never fired, demoted, suspended, disciplined or transferred Oleszko; she never had a title taken away from her; she was never given more burdensome work assignments, written up, or denied a raise. In due course, SCIF paid her at the highest rate for a programmer.

Starting in April of 1995, SCIF placed Oleszko among the first group of programmers to receive comprehensive training on its new information technology database. Effective July 1, 1996, SCIF promoted her to associate analyst, along with approximately 30 other programmers, in a major departmental restructuring.

Oleszko claims, however, that SCIF favored Asians in its Information Technology Department. Oleszko filed suit on February 19, 1995 through her boyfriend, Peter G. Lomhoff, who happens to be a litigation attorney. Oleszko's Complaint alleged claims for sexual harassment, retaliation for reporting sex harassment, and reverse race and national origin discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e *et*

seq. After investigation, the Equal Employment Opportunity Commission had found all these claims to be without merit.

As to Oleszko's sexual harassment claim, the record before the District Court and Court of Appeals showed the claim failed, as a matter of law, for a host of reasons. Oleszko admittedly was not subject to any sexual advances or demands, or to any offensive remarks or touchings. She did not assert that any obscene, vulgar or sexual language was used at the Home Office; that any off-color pictures of women were posted or circulated; or that women experienced any unwelcome kissing, touching, or propositioning. In addition, she admitted that she never witnessed a SCIF employee proposition another employee, or even say or do something that she found offensive. Indeed, Oleszko admitted that as far as she knew, none of this type of conduct occurred at the Home Office. Oleszko also admitted in deposition that the "close personal relationship" between managers Howard and Cooke was not "sexual harassment" of Oleszko: "[n]o, how is that sexual harassment?"[;] "... [n]o, that is not sexual harassment."

Although Oleszko had no valid civil rights claims herself, her counsel sought discovery from SCIF's EAP regarding confidential communications by other employees in an attempt to show a pattern and practice of sex, reverse race and national origin discrimination and retaliation. Even if it existed, no such evidence could supply the missing elements of Olezsko's disparate treatment claims, however. Thus, SCIF still would be entitled to summary judgment.

2. The SCIF Employee Assistance Program

SCIF's EAP provides assessment and referral services with respect to all types of employee personal problems including substance abuse, stress, depression, physical problems and family problems. The EAP itself does not provide psychotherapy. The EAP referrals may include licensed psychiatrists, psychologists and clinical social workers. The EAP contacts the professional directly and, in some instances, the EAP will pay for treatment. The EAP also keeps in touch with the employee to offer support and make certain the referral and psychotherapy are effective. SCIF's EAP thus increases access to mental health treatment. [App. 8].

SCIF's EAP manager-counselor and the three other counselors have college degrees and backgrounds in theology, psychology or social work. All are trained counselors. Paul Read, the EAP manager, has a master's degree in theology with an emphasis in pastoral care. He has done graduate work in psychology; he has taken alcohol and substance abuse courses, and courses relating to basic EAP skills; he has received training in areas commonly encountered by EAP counselors including violence at work, grief and suicide; and he is a member of the Employee Assistance Professionals Association and has been certified by it. One of the three EAP staff counselors has a master's degree in social work; one has a bachelor's degree in psychology and is taking additional courses toward entering a master's program in that field; and the third has a bachelor's degree in

social work. All the staff counselors also have relevant clinical or field experience in psychology or social work.

SCIF's EAP booklet for employees states that if "you have a personal problem that affects your job, interferes with your life or your relationships, you owe it to yourself and those around you to get help." The booklet promises:

> **What About Confidentiality?**
>
> Using the Employee Assistance Program is strictly confidential. Your personnel file will never contain information about participation in the program. No one, neither supervisors nor co-workers, will ever be told of your participation in EAP.

The booklet also states:

> **What Problems Will The Employee Assistance Program Help With?**
>
> The EAP will help you with any situation that has the potential to interfere with your work. Employees have come to the EAP for help in dealing with problems having to do with:
>
> - family stress
> - marriage
> - divorce or separation
> - personal relationships

- legal questions
- financial concerns
- drug and alcohol abuse
- eating disorders
- gambling
- emotional distress

SCIF's EAP takes strict measures to ensure confidentiality. Only EAP personnel have access to EAP files. The files are kept in a locked cabinet in the EAP office, and all EAP files are shredded after five years. [App. 4-5].

SCIF's EAP released Oleszko's own records to her pursuant to her written waiver of confidentiality. The EAP, however, refused in 1996 to produce documents or to testify about communications by other employees based on privilege under Federal Rule of Evidence 501 and *Jaffee v. Redmond*, 518 U.S. 1 (1996). SCIF and the EAP also pointed out that Oleszko had not established the relevance of the discovery, or that less obtrusive means of discovery from other sources, such as co-workers, were unavailable to her.

C. Proceedings Below

Two District Court Judges reviewed different portions of Oleszko's civil rights claims and correctly held they were without merit in that she could not even establish a *prima facie* case. In particular, the District Court held that she could not establish adverse employment action. [App. 51]. It granted SCIF summary judgment on the civil rights claims. It also

upheld the confidentiality privilege for communications to SCIF's EAP. [App. 35-36].

On appeal, the Ninth Circuit affirmed the summary judgment in the unpublished portion of its opinion. [App. 13-15]. The Court concluded that Oleszko could not establish the elements of a sexual harassment claim. [App. 14-15]. In point of fact, Oleszko did not satisfy either the "objectively hostile" or the "subjectively perceive[d]" elements of a hostile working environment claim, both of which must be satisfied. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993). She did not personally experience any sexual harassment or witness the sexual harassment of anyone else. As SCIF pointed out to the Court, communications by other employees to the EAP could not change these results.

As to the retaliation and the reverse race and national origin claims, the Court of Appeals concluded that Oleszko failed to make out a *prima facie* disparate treatment case. [App. 14]. Additionally, the Court found that even if she had established a *prima facie* case, she submitted no evidence that SCIF's legitimate, nondiscriminatory reasons for failing to promote her before July of 1996 were mere pretext for discrimination. [App. 14]. She did not follow accepted procedures for seeking a promotion [App. 46]; she told SCIF in 1993 she did not want to be promoted; and none of her supervisors thought her work deserved a promotion. Similarly, the Court held that Oleszko failed to show that SCIF's neutral reasons for any alleged retaliation were pretextual. [App. 14-15]. Indeed, there was no retaliation. As SCIF again

pointed out to the Court, communications by other employees to the EAP could not change these results.

In its published opinion, the Court of Appeals, after an analysis of *Jaffee v. Redmond* and the EAP's role as the troubled employees' "primary link" to psychotherapy, held that employee communications to SCIF's EAP were privileged under Rule 501 and *Jaffee v. Redmond*. [App. 12].

REASONS FOR DENYING THE WRIT

I. The Petition Seeks Review Of A Court of Appeals' Opinion On A Unique Discovery Issue That Is Irrelevant To The Ultimate Outcome Of The Case And Does Not Involve Disagreement Among The Circuits.

In its unpublished opinion, the Court of Appeals properly affirmed the District Court's summary judgment in favor of SCIF on Oleszko's claims of sexual harassment, retaliation, and reverse race and national origin discrimination in violation of Title VII. [App. 13-15]. Oleszko's civil rights claims failed for reasons specific to her workplace situation, including the absence of a hostile work environment and adverse employment action [App. 51], reasons which would not change if she had obtained discovery of other employees' EAP files or the testimony of EAP staff.

As discussed below, the Court of Appeals' published opinion upholding the confidentiality of SCIF's EAP is correct. [App. 1-12]. The opinion was not at all necessary, however, to the ultimate outcome of the case. Nothing in the EAP files of other

employees, or the testimony of EAP staff, would cure the basic defects which the District Court and Court of Appeals found in Oleszko's civil rights claims. Admittedly, Oleszko had not personally experienced, or witnessed, sexual harassment of herself or others; she did not follow accepted procedures for seeking a promotion [App. 43-44, 46]; she had told her supervisors in 1993 she was not interested in being promoted; and she was not subject to adverse employment action. [App. 51, 14-15]. As a result, Oleszko could not even establish a *prima facie* case of disparate treatment. [App. 14, 51]. Even if she could, the Court of Appeals correctly found that she submitted no evidence that SCIF's legitimate, nondiscriminatory reasons for failing to promote her before July of 1996 were a mere pretext for discrimination, or that SCIF's actual reasons for any alleged retaliation were pretextual. [App. 14-15].

In short, the Court of Appeals still would be required to affirm the District Court's summary judgment even if the privilege issue were decided differently by this Court. This case, therefore, is a remarkably poor vehicle for a Supreme Court decision on whether communications to an Employee Assistance Program should be shielded by privilege under Rule 501 of the Federal Rules of Evidence. Further, there has been scant litigation, and no disagreements among the Circuit Courts, on whether employee communications to EAPs are governed by the psychotherapist-patient privilege. The recent opinion in *Jaffee v. Redmond, supra,* does not require revisiting.

II. The Court Of Appeals' Opinion Does Not Conflict With This Court's Opinion In *Jaffee v. Redmond.*

Oleszko first asserts that the Petition for Writ of Certiorari should be granted because, in her view, the Court of Appeals' published opinion directly conflicts with this Court's opinion in *Jaffee v. Redmond*, 518 U.S. 1 (1996). No such conflict exists.

In *Jaffee*, this Court recognized an absolute privilege for psychotherapist-patient communications pursuant to Rule 501. The Court looked to three factors to determine whether the asserted psychotherapist-patient privilege for communications to a licensed clinical social worker, who happened to be employed by an EAP, was sufficiently important to outweigh the need for probative evidence: (1) whether the privilege served important private interests; (2) whether the privilege served public ends; and (3) whether the evidentiary benefit resulting from the denial of the privilege was significant. *Jaffee, supra*, 518 U.S. at 10-11.

As discussed in more detail below, the Court of Appeals correctly held that the rationale used by this Court in *Jaffee* compels the recognition of a privilege for the SCIF EAP communications sought by Oleszko. [App. 12]. A recent law review article reaches the same conclusion: "In light of the clear private interests supporting an Employee Assistance Program counsel-patient privilege, the societal interest in employees seeking EAP intervention, and the necessity of confidentiality both to encouraging employees to seek counseling and to providing effective therapy, the

privilege the Supreme Court annunciated in *Jaffee* should be expanded to include EAP counselors." Jack A. Guggenheim & Dr. Aaron D. Werbel, *Confidentially Speaking: Why The Psychotherapist-Patient Privilege Should Include Employee Assistance Program ("EAP") Counselors*, 68 UMKC L.Rev. 29, 48 (1999); *see also Greet v. Zagrocki*, 1996 WL 724933, *2 (E.D. Pa. 1996); *United States v. Lowe*, 948 F.Supp. 97, 99 (D. Mass. 1996) (extending privilege to rape crises counselors under control of licensed personnel).

A. Extending the Psychotherapist-Patient Privilege to SCIF's EAP Serves Important Private Interests.

The Court of Appeals correctly held that extending the privilege to employee communications with SCIF's EAP serves important private interests, as required by *Jaffe, supra.* [App. 12].

SCIF's EAP provides confidential assessment, counseling and referral services with respect to employee personal problems including drug and alcohol abuse, stress, depression, divorce and other family problems.[1] The EAP counselor performs vital

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[1] Oleszko's argument that the communications she sought were merely evidence pertaining to "workplace counseling" and, therefore, should not be protected, is misleading and erroneous. She was not seeking generic "workplace counseling" information, namely, discussions among employers and employees and their supervisors. Rather, she was seeking confidential information in the possession of SCIF's EAP, which has taken great efforts to ensure a confidential, insulated environment where employees can consult trained counselors to

tasks that are incidental to and functionally related to diagnosis and ultimate treatment, including listening to employee confidential communications about personal problems, extracting personal and at times painful information, assessing the situation and helping to identify problems, recommending resources to be used, working with the employee to determine the best course of action, and, as appropriate, referring employees to licensed psychiatrists, psychologists, and clinical social workers. Similar to licensed clinical social workers, the EAP counselors play a significant role in increasing access to mental health treatment for less affluent people who might otherwise go untreated. [App. 8].

SCIF's EAP also works closely with the psychotherapist by writing directly to the professional to confirm the referral, to state that it is confidential, and to explain payment procedures. In addition, the EAP keeps in touch with the employee to offer support and ensure that the plan of action and psychotherapy are effective. As the Court of Appeals concluded, SCIF's EAP is structured so that it serves as the "*primary link* between the troubled employee and psychotherapeutic treatment." (emphasis added) [App. 9]. "As part of the mental health 'team'," SCIF's EAP has "access to much of the same highly sensitive

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seek assistance and referrals for sensitive personal problems. EAP communications are not casual workplace discussions around the water cooler; they involve frank, confidential and potentially embarrassing disclosures made as the first step towards obtaining assessment and referral. For the EAP to continue to exist and to function effectively, all communications must be protected from disclosure.

information that is protected by privilege when revealed to a treating psychiatrist or social worker." [App. 9].

SCIF's EAP, therefore, depends upon an atmosphere of confidence and trust in which the employee is willing to make a frank and complete disclosure of facts, emotions, memories and fears. "'Confidentiality is the cornerstone of an effective EAP'." *Confidentially Speaking*, 68 UMKC L.Rev. at 34 (citation omitted). Because of the sensitive nature of the problems confronted by the EAP, any disclosure would cause embarrassment or disgrace to the employee seeking referral and treatment. Employees with personal and private problems will not voluntarily seek help from an EAP if there is a fear that communications will not be kept confidential, especially among co-workers and supervisors. Quite likely, the employees will not obtain treatment at all. Even if an employee contacts the EAP but doubts the confidentiality of communications, the employee is less likely to disclose full information, a situation which may lead to an incomplete assessment or an ineffective referral.

Accordingly, SCIF's EAP takes great pains to offer and ensure confidentiality. [App. 4-5]. "Counseling is an integral part of most EAPs and they are therefore designed with confidentiality in mind." *Confidentially Speaking*, 68 UMKC L.Rev. at 34. Confidential employee statements to SCIF's EAP manager and counselors thus should be privileged in their own right as communications seeking not only assessment but guidance and crisis intervention, including ultimate referral and possible EAP payment

for appropriate resources such as licensed psychiatrists and psychologists.

Such communications also should be privileged as "threshold communications" which lead to the psychotherapist-patient relationship. *See* 25 C. Wright & K. Graham, *Federal Practice & Procedure* § 5531 (1989) (discussing "threshold communications" incidental to seeking therapy and communications with non-physician members of the health care delivery team that are functionally related to diagnosis and treatment). Professor Wright argues that privilege should be accorded based on the *need* for confidentiality, not on attempts to "assess the social worth of the various caring professions." *Id.* at § 5522.

As Professor Wright notes, the privilege should also attach to a person's communications to a third-party payor (which would include EAPs) because, "'since all but the most affluent must carry some sort of health insurance,'" to hold that there is no privilege in such cases would "'endow the less-wealthy, insured patient with less privacy than the wealthy, uninsured patient,'" *Id.* at § 5531 (citation omitted). Indeed, as the Ninth Circuit recognized, many health insurance plans now require employees to first utilize EAPs for assessment and referral before they may seek psychotherapy to be paid for by the insurer. [App. 8].

B. Extending the Psychotherapist-Patient Privilege to SCIF's EAP Serves Important Public Interests.

The Court of Appeals correctly held that extending the privilege to employee communications to SCIF's EAP also serves public ends, as required by

Jaffee, supra. [App. 8, 12]. EAPs illustrate the precept that "a stitch in time saves nine." All EAPs, including SCIF's program, can assist in resolving societal and workplace problems at an early stage – at little or no financial cost to the troubled employee – thus avoiding greater problems such as injuries and accidents at work, and both domestic and workplace violence. *See, How EAPs Improve Both Productivity And Attendance*, 99-5 Compensation & Benefits for L. Off. 10 (1999).

The availability of mental health treatment referrals in the workplace makes such referrals far more accessible. It also helps to reduce the stigma associated with mental health problems, thus encouraging more employees to seek treatment. In many cases, EAPs and EAP-paid or insurer-paid treatment also may present the *only* access to licensed psychiatric or psychological help that non-affluent employees will ever have. EAPs thus assist in increasing access to mental health treatment in a swift, non-stigmatized and cost-effective manner that benefits both employees and employers and American society as a whole.[2]

EAPs, therefore, are not idle exercises, as Oleszko insists. American workplaces, no less than schools, have become infected with violence. Federal

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2 The *Jaffee* Court also considered economic factors in extending the psychotherapist-patient privilege to a licensed clinical social worker. The Court recognized the unfairness of limiting the privilege to communications with psychiatrists and psychologists who may not be as economically accessible to people in need of counseling. 518 U.S. at 16-17. The great accessibility and cost-effectiveness of EAPs militate in favor of applying the privilege to EAP communications as well.

and state agencies are not immune. It is estimated that there are more than 2 million physical assaults and more than 7,000 homicides (12% of all workplace deaths) in the workplace per year. "Employers Confront Violence in the Workplace of the 1990's," *Medical Laboratory Observer*, Vol. 28, No. 5, p. 34 (May, 1996). The U.S. Department of Labor reported in 1994 that homicide replaced automobile accidents as the leading cause of death for women in the workplace and ranks as the second leading cause for men. "Making Sense of Violence in the Workplace," *Risk Management*, Vol. 42, No. 10, p. 50 (October, 1995). The cost of workplace violence is estimated at $4.2 billion per year. *Id.* These are not problems caused by the rich; the person bringing a weapon to work is more likely to arrive by bus than in a Mercedes-Benz. Organizations which assist in crisis intervention and steering a disturbed individual to psychotherapy serve a high public goal.

Not surprisingly, commentators have noted EAP effectiveness in reducing both domestic and workplace violence. *Confidentially Speaking*, 68 UMKC L. Rev. at 34; *see also*, Jill C. Robertson, *Addressing Domestic Violence In The Workplace: An Employer's Responsibility*, 16 Law & Ineq. 633, 655 (1998); *Employer Liability For Domestic Violence In The Workplace: Are Employers Walking A Tightrope Without A Safety Net?*, 31 Tex. Tech. L.Rev. 139, 177 (2000) ("EAP counselors provide excellent protection for employers and employees alike when they are trained in the area of domestic violence and its potential impact on the workplace.")

All EAPs, including SCIF's program, are also beneficial to both public and private societal interests because they increase work productivity and safety. "A large body of research shows that employee assistance programs more than pay for themselves by reducing absenteeism, on-the-job accidents, medical visits and workers compensation claims." Fran Henry, "Employers Are Extending Helping Hand to Employees," *The Plain Dealer*, December 12, 2000, at 1E. According to statistics from the Department of Labor and from the National Counsel on Alcoholism and Drug Dependence, "employers save $5 to $16 for every dollar invested in an employee assistance program." *Id. See also* William Atkinson, "Wellness, Employee Assistance Programs: Investments, Not Costs," *Bobbin*, Vol. 41, No. 9, p. 42, May 2000.

The utility of EAPs, however, depends on the strict confidentiality of communications. [App. 4]. In EAP cases, as in psychotherapist-patient cases, the threat to secrecy would block successful communications necessary to identify and assess problems and guide the individual into psychotherapy. Absent the privilege, most troubled employees would not seek EAP intervention and may not obtain treatment at all. Others would be forced to reveal confidences to the EAP counselor that would not be protected by privilege in order to access professional treatment. Still others may provide only half-truths which would impede appropriate assessment and referral. None of these alternatives serves public or private interests.

As the Court of Appeals concluded, recognition of the public and private utility of confidential EAP

programs is demonstrated by the ever-increasing number of EAPs throughout the United States and also by the number of state and federal governmental agencies which require or approve of such programs. [App. 10]. *See,* 41 U.S.C. § 701(a)(1)(B)(iii) (mention of employee assistance programs in federal contractor drug awareness programs); 5 U.S.C. § 7904(a) (relating to services available to federal employees and entitled "Employee assistance programs relating to drug abuse and alcohol abuse"; Cal. Government Code § 8355 (similar to 41 U.S.C. § 701); Cal. Government Code § 19816.16 (implementation of State Employee Assistance Program). *See also* "EAPs Help Protect Firm's Important Assets — People," *Wichita Business Journal,* Vol. 12, No. 9, p. 11 ("Nationally, more than 80 percent of the Fortune 500 companies offer some form of an EAP"); "Employee Assistance EAPs Keep Growing," *Work and Family News Brief,* August, 1995 (79% of companies surveyed in William M. Mercer study relied on EAPs). The labor agreement between the California State Employees Association and the State specifically requires a confidential EAP. Further demonstrating that EAPs serve important public goals, the District Court, the Ninth Circuit, and this Court itself provide EAPs for their own employees.

C. No Evidentiary Benefit Would Result From Denying the Privilege to Communications to SCIF's EAP Counselors.

The Court of Appeals correctly found that the third prong of *Jaffee* is satisfied, as well. [App. 8, 12]. As with the psychotherapist-patient privilege, there is

no real evidentiary benefit to denying the privilege to communications with SCIF's EAP. Employees would not make use of an EAP unless confidentiality is assured. The EAP door would be bolted. Evidence would not be lost; it would no longer come into existence. Therefore, as in *Jaffee*, the communications which Oleszko sought would not exist in the first place but for the expectation by other SCIF employees of confidentiality or privilege.

III. The Court of Appeals' Opinion Does Not Violate Rule 501 Of The Federal Rules Of Evidence As Interpreted In *Jaffee v. Redmond*.

Oleszko's second reason for granting the writ is her assertion that the Court of Appeals' opinion violates Rule 501 of the Federal Rules of Evidence as interpreted in *Jaffee, supra*. Specifically, she states that "reason and experience" prohibit the Court of Appeals from adopting a privilege for confidential communications to EAPs. Not so.

This Court's directive to consider "reason and experience" was not meant to "*freeze* the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to '*continue* the evolutionary development of testimonial privileges.'" *Jaffee, supra,* 518 U.S. at 8-9 (emphasis added) (citation omitted). The Court of Appeals observed that this Court left to later courts the task of "delineat[ing] [the] full contours" of the privilege. *Jaffee, supra,* 518 U.S. at 18. [App. 6]. The widespread acceptance and increasing use of confidential EAPs throughout this country, the private and public sectors' investments in EAPs, and

their reduction of domestic and workplace violence, are the types of circumstance which should drive the "evolutionary development of testimonial privilege" discussed in *Jaffee*. In the Court of Appeals' view, "EAPs embody what may be viewed as a team approach to providing mental health services," serving as a "primary link" – a "gateway" – between the troubled employee and mental health treatment by licensed psychiatrists, psychologists and clinical social workers. [App. 9, 12].[3]

"Reason and experience" dictate that all communications to SCIF's EAP be recognized as privileged. This is true independently of whether the counselors may handle, in the same day, employee problems involving what may appear to be a mundane matter, such as acute disappointment over a change in shift, or a full-blown emotional crisis arising from an assault at home and a threatening call to the office, a crisis which may require an immediate referral to professional help. In each instance, the employee has sought help from an agency promising assessment and referral on a confidential basis, and the employee's confidential communications should be kept confidential. Employees should know, before contacting an EAP, that a privilege will attach;

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[3] While the SCIF EAP does not provide psychotherapy, it makes confidential assessments and referrals, it corresponds directly with the professionals, it serves as a third-party payor, and it engages in follow-up sessions with employees to offer support and make certain the referrals and psychotherapy are effective. Thus, SCIF's EAP is an essential part of the mental health "team."

otherwise, there will be no contact and most likely no treatment at all.

The Court of Appeals properly concluded that all EAPs assist in resolving employees' mental health problems, which the Court in *Jaffee* determined to be a "public good of transcendent importance." 518 U.S. at 11. [App. 7]. The Court of Appeals stated that EAPs, like social workers, "play an important role in increasing access to mental health treatment." [App. 8]. EAPs have become, in essence, the blue and white collar workers' portal to psychotherapy.

The Court of Appeals recognized that while EAPs are still a fairly new creation, several states and courts have already begun to recognize a privilege for confidential communications to EAP counselors. [App. 10]. Oleszko attempts to point out dissimilarities between the various states' approaches, but dissimilarities are to be expected in any evolutionary process. The psychotherapist-patient privilege must encompass pre-counseling confidences designed to assess the problem, offer financial support and assist the troubled employee in finding professional treatment. Parallel to this Court's reasoning in *Jaffee* and Professor Wright's view of *need* as the criterion for privilege, these confidential communications are as worthy of a privilege protection as communications by the more affluent to their board-certified psychoanalysts. The individuals' needs for counseling and confidentiality are exactly the same, while a privilege for both groups serves the identical public goals. Indeed, the only difference in needs is that the less affluent may require the accessibility, referral experience and financial support

of an EAP, while the wealthy can select their own specialists and pay their own way. The only difference in societal interests is that troubled workers – unless properly referred and treated – may become less productive and pose a threat to workplace safety, added considerations which favor a testimonial privilege for EAPs.

Because EAPs assist in addressing serious national problems such as substance abuse, depression in the workplace and domestic violence, the Court of Appeals correctly found that EAPs serve both important private interests and public interests. [App. 8-9, 12]. Due to the importance of these interests and the necessity of confidentiality for EAPs to function effectively, the Court protected this "gateway" to mental health treatment by licensed professionals through a logical extension of the psychotherapist-privilege recognized in *Jaffee* to communications with EAP personnel. [App. 12].

IV. The Court of Appeals' Opinion Does Not Conflict With The Eighth Circuit's Opinion in *Carman v. McDonnell Douglas.*

Oleszko's third reason for granting the writ is her incorrect assertion that the Court of Appeals' decision conflicts with *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997). The Court of Appeals correctly distinguished the Eighth Circuit opinion. [App. 6-7].

The Eighth Circuit opinion merely held that employee communications to a corporate ombudsman, who investigated and mediated workplace disputes, were not privileged under Rule 501. Unlike an EAP,

the ombudsman's realm was limited to workplace disputes; he did not provide assessment or referral of employees' personal problems to licensed professionals. Confidentiality, therefore, was not paramount. If an employee had a meritorious workplace complaint, the person would be undeterred by the prospect of civil discovery from sharing the complaint with an ombudsman. Based on all these factors, the Court concluded that the mediation of workplace disputes prior to litigation was not a sufficiently important interest to warrant the creation of a new evidentiary privilege.

V. The Court of Appeals' Opinion Correctly Extends The Psychotherapist-Patient Privilege to SCIF's Employee Assistance Program.

Oleszko's final reason for granting the writ is her belief that the Court of Appeals' opinion supposedly violates fundamental policies of this Court and of American jurisprudence. Oleszko's views are misbegotten.

As the Court of Appeals concluded, a privilege for confidential communications to SCIF's EAP is fully warranted. [App. 12]. Similar to other EAPs, the mission of SCIF's EAP is to provide an immediate, confidential workplace solution so that small problems do not become large ones, and so that large ones do not spin out of control. SCIF's EAP ensures that employees of modest means can receive assessment, referral and, in many instances, financial assistance for psychotherapy, when required. This workplace journey to mental health care must begin with

confidential communications in the form of painful, private disclosures to the EAP counselors, threshold communications which deserve the same protection as communications to the ultimate psychotherapist.

Additionally, as the Court of Appeals observed, "[t]o protect only disclosures made during psychotherapy while exposing those same disclosures to discovery when made to another member of the mental health team in order to access psychotherapy would significantly undermine the psychotherapist-patient privilege." [App. 9]. Denial of the privilege would also undermine the EAP goals of worker productivity, mental health and the reduction in domestic and workplace violence, goals that mirror the best of society's own goals.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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